(9)

No. 95-1873

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1995

GUY E. ADAMS, *et al.*,

Petitioners,

v.

CHARLIE FRANK ROBERTSON and LIBERTY NATIONAL LIFE INSURANCE COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF OF *AMICUS CURIAE* TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C., IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to pursuing justice for the victims of corporate and governmental abuses. Litigating throughout the federal and state courts, TLPJ prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless.

As part of its efforts to ensure the proper working of the civil justice system, TLPJ has established a Class Action Abuse Prevention Project dedicated to monitoring, exposing, and preventing abuses of the class action device nationwide. Through this work, TLPJ has become especially concerned about efforts by defendants to create mandatory, "non-opt-out" settlements that deprive victims of their constitutional rights to pursue individual damages litigation. TLPJ submits this brief to urge the Court to reject this tactic and reaffirm that due process requires an opt-out right with respect to any substantial damages claims included in a class action, even where those claims are included in or released by a settlement that also includes some form of injunctive relief.

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[1] Letters of consent to the filing of this brief have been filed with the Clerk.

STATEMENT

This case arose from a dispute over cancer insurance policies sold by Liberty National Life Insurance Company ("Liberty"). The policies originally provided unlimited coverage for radiation, chemotherapy, and prescription drugs to fight cancer. 2a. However, in late 1986, Liberty began a "cancer policy exchange program" to persuade policyholders to switch to new policies that, according to petitioners, had higher premiums yet contained severe limitations on coverage. 3a.

On May 12, 1992, Charlie Frank Robertson sued Liberty for fraudulently causing loans to be made upon his life insurance policy. He sought compensatory and punitive damages, but no injunctive relief. 3a. On October 1, 1992, Robertson filed an amended complaint and motion for class certification on behalf of approximately 200,000 individuals (including both Alabama residents and residents of four other states) whose old cancer policies had been exchanged for new policies. Like Mr. Robertson's original complaint, the class complaint sought compensatory and punitive damages for fraud. Its only reference to injunctive relief was a clause at the end, following the prayer for damages, seeking "injunctive relief as deemed necessary by the Court." Amended Complaint at 4.

On March 9, 1993, one day before the class was certified, Robertson's counsel filed several individual lawsuits against Liberty on behalf of policyholders seeking compensatory and punitive damages based upon the same cancer policy exchange program at issue in the class action. None of those cases sought any injunctive relief with respect to Liberty; rather, they all exclusively sought compensatory and punitive damages arising out of Liberty's fraudulent conduct.[2]

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[2] *See Robert I. Stewart, et al., v. Liberty National Life Insurance*

The following day, on March 10, 1993, the class was preliminarily certified under Alabama Rule of Civil Procedure 23(b)(2), which -- like its federal counterpart -- does not permit a right to opt out. The class definition specifically *excluded* "any insured, who on or before the date of this class certification order, has filed a separate action against [Liberty] asserting claims arising out of the cancer policies on coverage." Petition at 10 n.7. Because the class definition excluded any pre-filed cases, the individual damages actions filed by class counsel on March 9 were permitted to go forward outside the class.

On June 13, 1993, a proposed settlement was reached that provided monetary relief to a tiny percentage of the class -- *i.e.*, those class members who had contracted cancer and made claims under the new policies. First, those individuals received 100% repayment of their monetary losses resulting from the limitations in their new policies. (This relief was later enhanced to include "an additive of 50% to cover the cost of the loss of use of money and any attendant mental anguish, pain and suffering." 55a.) Second, the cancer victims received "ancillary monetary relief" in the form of what the settlement called "extracontractual" or "punitive" damages placed in two escrowed funds totalling $4 million. (This relief was later enhanced to include an additional $7 million. 39a-40a.)

The remainder of the class -- those individuals who had *not* been diagnosed with cancer and therefore had not made claims under their cancer policies -- did not receive any monetary compensation under the proposed settlement. For

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Co., Barbour County Case No. CV-93-025; *James L. Gould, et al., v. Liberty National Life Insurance Co.*, Barbour County Case No. CV-93-024; *Louise Peel v. Liberty National Life Insurance Co.*, Barbour County [no case number indicated on complaint].

these class members, there was no provision for repayment of the excess premiums they had paid for their new policies; no provision for reducing those premiums in the future; no compensation for loss of use of their money and any attendant mental anguish, pain, and suffering; and no provision for any "extracontractual" or "punitive" damages. The settlement nonetheless required these individuals to release any pending or future claims for compensatory and punitive damages related to Liberty's cancer policy exchange program. 77a-79a.

The settlement also provided non-monetary relief to both segments of the class. In essence, Liberty agreed to: (1) refrain from instituting any new "cancer policy exchange programs" in the future without full disclosure; (2) reform its cancer policies to eliminate the coverage advantages it obtained through the exchange program (but not to refund or eliminate the premium increases charged class members); and (3) refrain from additional premium increases until a specified date. 10a-11a.

Numerous class members objected to the proposed settlement on the ground, among others, that the class should have been certified under Alabama Rule 23(b)(3), which permits a right to opt-out. In addition to advancing rule-based arguments, the objectors maintained that due process requires an opt-out right in class actions including substantial damages claims, notwithstanding the presence of claims for injunctive relief. The objectors explained that an Alabama jury had awarded over $1 million in damages to an individual victim of Liberty's exchange program who -- like the vast majority of the class -- had not made any claims under her policy. *See* 60a (citing *McAllister v. Liberty National*, CV92-4085-RIB).[3] They

[3] *McAllister* was subsequently affirmed by the Alabama Supreme Court. *See Liberty National Life Ins. Co. v. McAllister*, No. 1931163, 1995 WL 129224 (Ala. Apr. 7, 1995), 136a-151a.

also pointed out that the Alabama Supreme Court had recently held that the payment of additional premiums for a new, less valuable policy issued under Liberty's exchange program constituted damages sufficient to sustain a claim for fraud. *See* 59a (discussing *Boswell v. Liberty National*, 643 So.2d 580 (1994)). Given that the settlement would release their legally cognizable -- and potentially very substantial -- damages claims, the objectors argued that due process did not permit certification of a mandatory class.

The trial court rejected the objectors' arguments, finding that due process did not require an opt-out right under these circumstances. In its final order approving the settlement on May 26, 1994, the court held that certification under Alabama Rule 23(b)(2) was proper because "the predominant relief provided for in this settlement . . . is equitable relief . . .." 76a. In so holding, the trial court made no effort to analyze whether the predominant relief sought in the complaint and released by the settlement was for money damages; instead, the court simply looked to the terms of the settlement agreement. *See* 76a-77a.[4]

Various objectors appealed the approval of the non-opt-out settlement to the Alabama Supreme Court, arguing, among other things, that the mandatory class violated the due process

[4] The trial court also found that certification was proper under Alabama Rules 23(b)(1)(A) and (B), which -- like their counterparts in the Federal Rules of Civil Procedure -- permit certification of a mandatory class where the prosecutions of separate actions could "establish incompatible standards of conduct for the party opposing the class" or "be dispositive of the interests of the other members not parties to the adjudications or substantially impede or impair their ability to protect their interests." 77a. In so holding, the trial court's principal justification was that permitting individual lawsuits against Liberty could eventually exhaust its available assets, leaving some victims uncompensated. *See* 72a.

clause of the United States Constitution. The Alabama Supreme Court rejected the challenge, finding that "simply because a . . . class action settlement may ultimately result in an award of damages does not prevent [mandatory] class certification under [Alabama Rule 23]. . . . So long as the relief is *primarily* equitable or injunctive, a class action settlement that also includes money damages with a mandatory non-opt-out provision is proper." 12a (emphasis in original; citation omitted).[5]

SUMMARY OF ARGUMENT

This case presents the question of whether individuals may be included, against their will, in a class action that releases their substantial damages claims without any monetary compensation simply because the settlement also provides some injunctive relief. Under this Court's holding in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 & n.3 (1985), the answer to this question must certainly be "no."

Shutts held that, in "those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments," absent class members have a due process right to opt out of the class. *Id.* at 811, n.3. The Alabama Supreme Court held that *Shutts* does not apply to this case on the theory that the class action is primarily injunctive in nature. In so holding, the court looked solely to the relief provided in the *settlement*, as opposed to the claims alleged in the complaint

[5] In so holding, the Alabama Supreme Court looked solely to the presence of injunctive relief in the settlement as justifying certification of a mandatory class under Alabama Rule 23(b)(2). It did not address the trial court's holding that mandatory class certification was also proper under other provisions of the Rule due to the alleged risk that individual lawsuits could exhaust Liberty's assets. *See* n.4, *supra*.

and released in the settlement. This approach makes no sense, since it fails to take into account what claims are being given up as part of the resolution of a class proceeding. The lower court's approach, moreover, invites manipulation of the class action device by defendants seeking to cap their liability in damages cases. If the decision whether a case is "wholly or predominately" for money damages under *Shutts* is solely a function of what the settlement provides, then defendants seeking a unitary disposition of their liability can resolve damages class actions on a non-opt-out basis by insisting on settling them for injunctive relief and little -- or no -- money damages.

To prevent such manipulation of class members' constitutional rights, courts seeking to determine whether a case is "wholly or predominately for money judgments" must focus on the claims asserted in the complaint and those that are released as part of the settlement, rather than on the terms of the settlement agreement itself. In this case, the focus of the class complaint was money damages, and the settlement requires class members to release all their claims for compensatory and punitive damages against Liberty. Despite the breadth of the release, the vast majority of the class will receive *no* monetary compensation as part of the class settlement; all they will receive is injunctive relief of questionable value that was never sought in the complaint and is not being sought in the individual cases that class counsel carved out of the class the day before it was certified on a non-opt-out basis under Alabama Rule 23(b)(2). Under these circumstances, the only logical conclusion is that this action is "wholly or predominately for money judgments" within the meaning of *Shutts*.

Even assuming, *arguendo*, that this case is "primarily" injunctive in nature, the lower court's decision was still in error, since due process requires an opt-out right with respect to substantial damages claims included in a class action seeking

injunctive relief, regardless of the extent of injunctive relief sought or obtained. As a logical matter, it does not make sense to contend that the opt-out right recognized in *Shutts* evaporates simply because a damages claim happens to be coupled with a request for injunctive relief. Moreover, there is no policy justification for permitting mandatory class certification in "hybrid" cases that contain a mixture of injunctive and damages claims. The rationale for permitting mandatory classes -- that class members share an indivisible, unitary interest in common relief -- may exist in regard to the injunctive claims, but it does *not* exist with regard to the damages claims. Depriving class members of the right to opt out of hybrid cases would also invite abuse of the class action device, since all defendants would have to do to achieve mandatory class certification is to persuade plaintiffs' counsel to couple their damages claims with extensive injunctive relief. For all these reasons, the proper approach in a hybrid case is to permit mandatory class certification with respect to the injunctive relief, but to certify the class on an opt-out basis with respect to the damages claims. Only this approach respects the class members' constitutional rights to pursue their individual damage recoveries in litigation subject to their individual control.

ARGUMENT

THE CERTIFICATION OF A MANDATORY CLASS IN THIS CASE VIOLATED THE CLASS MEMBERS' DUE PROCESS RIGHTS TO OPT-OUT.

This case should be viewed against the backdrop of increasing efforts by defendants to use class actions as vehicles for capping their liability in damages cases. Defendants facing liability for wrongful conduct that harmed large numbers of people have a powerful financial interest in preventing their

victims from filing individual lawsuits. A mandatory class is a perfect vehicle towards this end, since it permits a defendant to force all its victims into a one-size-fits-all proceeding and eliminate each potential plaintiff's right to control his or her own case -- *i.e.*, choose his or her own lawyer, decide when and where to sue, and determine whether to try the case or to settle it (and, if so, on what terms).

Historically, class members in federal class actions with substantial damages claims have been protected from mandatory settlements by Fed. R. Civ. P. 23(b)(3), which requires an opt-out right in cases predominately for money damages. *See* Fed. R. Civ. P. 23, Advisory Committee Notes (1966 Amendment), at 106-07. The constitutional underpinnings of this opt-out right were confirmed by this Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810-13 & n.3 (1985). However, over the past decade, defendants have increasingly attempted to create mandatory classes that strip victims of their right to exclude themselves from class litigation.

One tactic has been to seek certification under Fed. R. Civ. P. 23(b)(1)(B), which permits non-opt-out classes in cases where individual actions would "as a practical matter be dispositive of the interests of the other members not parties." This approach, however, has met with uneven success, because defendants often cannot make the requisite showing of a "limited fund" to justify certification of a non-opt-out class under 23(b)(1)(B) and because the propriety of capping liability via this approach is open to question.[6] To avoid this obstacle,

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[6] *Compare In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996), *petition for reh'g pending* (affirming, over vehement dissent, non-opt-out damages class of future asbestos victims under Fed. R. Civ. P. 23(b)(1)(B)) *with In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300 (6th Cir. 1984) (rejecting non-opt-out damages class of drug victims under Fed. R. Civ. P. 23(b)(1)(B) for failure to demonstrate limited fund). *Cf. In re School Asbestos*

defendants have started to seek mandatory class certification under a different provision of the Rule -- 23(b)(2) -- that applies to cases seeking predominantly injunctive relief.

To shoehorn damages cases into this prong of Rule 23, one approach has been to attempt to trade off class members' damages claims for settlements that consist solely or primarily of injunctive relief. *See, e.g., Brown v. Ticor Title Ins. Co.*, 982 F.2d 383 (9th Cir. 1992), *cert. dism'd as improv. granted sub nom. Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1292 (1994). Another approach has been to insert injunctive relief into a settlement that also includes substantial damages claims. *See, e.g., Hayden v. Atochem North American Inc.*, Civil Action No. H-92-1054 (S.D. Tex.) (decision whether to approve non-opt-out settlement of present and future personal injury claims pending). Under both approaches, the goal is to deprive class members of their constitutional right to opt out of class actions for damages and control their own cases.

This tactic of creating mandatory classes by coupling damages claims with injunctive relief in class action settlements threatens our most fundamental notions of individual access to justice. This case squarely presents the question of whether this trend should be permitted to continue. The mandatory settlement at issue traded off most class members' substantial damages claims in exchange for injunctive relief of questionable value and *no* monetary compensation. If the Alabama Supreme Court's decision approving the settlement is allowed to stand, then defendants everywhere will be given a green light to use non-opt-out class actions as vehicles for capping their liability

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Litig., 789 F.2d 996 (3d Cir.) (rejecting non-opt-out punitive damages class under Fed. R. Civ. P. 23(b)(1)(B) for failure to include all victims in the class), *cert. denied*, 479 U.S. 852, 915 (1986).

in damages cases. As explained below, this result is flatly at odds with *Shutts* and the U.S. Constitution.

I. Due Process Requires an Opt-Out Right in this Case Because the Suit Is "Wholly or Predominately" for Money Damages Within the Meaning of *Shutts*.

In *Phillips Petroleum v. Shutts*, 472 U.S. 797, 811 n.3 (1985), this Court held that absent class members have a constitutional right to opt out of a class suit "wholly or predominately for money judgments." The Alabama Supreme Court held that *Shutts* did not apply in this case because the class "*relief* is primarily equitable or injunctive" in nature. 12a (emphasis added). In other words, the court looked solely to the settlement agreement to determine whether damages claims predominate, rather than to all the claims set forth in the complaint and released as part of the settlement. Because the settlement itself contains mostly injunctive relief, the court concluded that no opt-out right was required under *Shutts*.

This approach makes no sense, since it fails to take into account what claims are being given up as part of the resolution of a class proceeding. In cases that proceed to judgment, it is the claims in the complaint that will be barred by the *res judicata* effect of a judgment, regardless of the extent of actual relief granted by the court. In cases that settle, it is the *released* claims that will forever be lost as a result of the class settlement. Without considering these claims, a court cannot realistically assess whether a class action is wholly or predominately for money damages within the meaning of *Shutts*. *See generally* H. Newberg & A. Conte, 1 *Newberg on Class Actions*, § 12.17 (3d ed. 1992) ("*Newberg*").

The language of *Shutts* itself demonstrates that the proper

focus is on the claims set forth in the complaint and released in the settlement. *Shutts* held that due process requires an opt- out right in any class action that "*seek[s] to bind* known plaintiffs concerning claims wholly or predominately for money judgments." 472 U.S. at 811 n.3 (emphasis added). The italicized language -- "seek[s] to bind" -- demonstrates that, when deciding whether a class action is predominately for money damages, a court should look at those claims that would be *bound* by a class judgment. The binding effect of a judgment, of course, must be determined with reference to the complaint and any accompanying release. Thus, contrary to the Alabama Supreme Court's view, the *relief* provided in the settlement is irrelevant under *Shutts*; rather, it is the "claims" that the case "seeks to bind" that determine whether the case is "wholly or predominately" for money damages.

The lower court's exclusive focus on the settlement agreement also leads to perverse results directly at odds with the rationale of *Shutts*. *Shutts* recognized that due process does not permit absent class members' damages claims to be compromised without their consent. Even though the individual claims at issue in *Shutts* were small, this Court held that due process requires, "at a minimum," notice and a right to opt out of the class. 472 U.S. at 812. Under the Alabama Supreme Court's approach, however, the *greater* the compromise of the class members' damages claims, the *less* likely they will be permitted to opt those claims out of the class. Thus, in cases where -- as here -- most class members' damages claims are traded off for a settlement that provides injunctive relief and *no* money damages, there will be no opportunity for class members to exclude themselves from the class. Moreover, under this approach, the substantiality of the damages claims at stake in the litigation becomes irrelevant. Thus, for example, if a class action seeking $100,000 in damages per class member and insignificant injunctive relief were later settled for some

injunctive relief and *no* damages, the lower court presumably would hold that no opt-out right exists under *Shutts*. This result is both unjust and nonsensical.

Finally, the lower court's approach invites manipulation and abuse of the class action device. As explained above, defendants faced with a large number of potential damages claims always prefer a mandatory class, and will exploit any opportunity to achieve a non-opt-out deal. If the decision whether a case is "wholly or predominately for money judgments" under *Shutts* -- and, therefore, whether a right to opt out exists -- turns on the terms of the *settlement*, then defendants will have a readily available means to this end. They will simply offer to settle a damages class action on the condition that it be converted into a mandatory class settlement under Fed. R. Civ. P. 23(b)(2) providing some form of injunctive relief and relatively little (or no) money damages. The defendants will be happy because they will have succeeded in capping their liability on the damages claims. Class counsel will be happy because they will have achieved a settlement that most likely includes a hefty award of attorneys' fees. The class members, however, will *not* be happy, because they will have lost their right to pursue and control their own individual damages claims in exchange for injunctive relief that they may not even want or need.

To avoid this manipulative deprivation of opt-out rights, the only permissible way to determine whether a case is "wholly or predominately" for money damages is to focus on the nature of the claims alleged in the complaint and released by the settlement, rather than on the relief provided by the settlement. If that approach is followed here, it is plain beyond purview that the class members have a constitutional right to opt out under *Shutts*. As explained above, the class complaint in this action sought compensatory and punitive damages for fraud.

The only reference to injunctive relief was a boilerplate clause at the end of the complaint, following the prayer for damages, seeking "injunctive relief as deemed necessary by the Court." Thus, from the outset, the focus of the class litigation was to obtain money damages for the class. It is undisputed, moreover, that such damages claims are cognizable under Alabama law, *see Boswell, supra*, 643 So.2d 580, and could potentially yield substantial verdicts in individual damages actions. *See McAllister, supra*, 1995 WL 129224 (affirming jury verdict against Liberty of over $1 million). Despite their value, those claims were *released* as part of a class settlement that did not provide a penny in monetary damages to the vast majority of class members.

If any doubt remained as to the true nature of the claims at issue, it would be dispelled by the individual lawsuits filed by class counsel the day before the class was certified on a non-opt-out basis under Alabama Rule 23(b)(2). As explained above, these cases include claims that are identical to those encompassed in the class action. For example, both *Robert I. Steward, et al., v. Liberty National Life Insurance Company*, Barbour County Case No. CV-93-025, and *James L. Gould, et al.*, Barbour County Case No. CV 93-024, include plaintiffs who dropped their old policies and purchased new cancer policies from Liberty as part of the cancer policy exchange program. Although these plaintiffs -- like the majority of class members -- never made any claims under their new policies, they sought compensatory and punitive damages for increased premiums and the pain and suffering they underwent when learning of Liberty's fraudulent conduct. Notably, none of these individual lawsuits sought any form of injunctive relief; instead, they sought purely money damages. Yet the same lawyer who filed those cases sought and obtained approval of a mandatory class settlement involving *identical* claims on the ground that the class action was somehow primarily injunctive

in nature. Under this approach, whether a class member has a right to opt out under *Shutts* has nothing to do with the true nature of claims; rather, it is solely a function of what relief is ultimately obtained in a class settlement. This result is illogical and -- as this case demonstrates -- leads to manifestly unfair results.

It is also worth noting that the injunctive relief provided in the settlement is of questionable value to class members. The first element of injunctive relief is Liberty's promise to refrain from instituting any new "cancer policy exchange programs" without full disclosure. This is nothing more than an agreement by Liberty not to defraud policyholders in the future -- hardly a valuable concession on Liberty's part since, if Liberty were ever to embark on another "exchange program," it would surely claim that it did so without deception. Second, although the settlement includes Liberty's promise to "reform" the class holders' policies to give them the benefits they would have received under their old policies, it does *not* include any provision for repayment of the additional premiums that class members were induced to pay on the new, less valuable policies (or to lower those premiums in the future). Thus, to receive the benefits of the settlement, these individuals must continue paying Liberty an inflated premium for the *same* benefits they received for less money prior to the fraudulent cancer policy exchange program. Finally, Liberty agreed to refrain from additional premium increases (*i.e.*, increases above and beyond the inflated premiums class members are already required to continue paying under the proposed settlement) until one year after final approval by the Alabama Supreme Court. This provision, too, is of dubious value, since Liberty could ultimately recapture the value of these premiums by raising its rates in the future. Thus, the injunctive relief provided in the settlement is of relatively little value to the vast majority of the class.

For all these reasons, when determining whether a class action is "wholly or predominately for money judgments" within the meaning of *Shutts*, the only constitutionally permissible approach is to evaluate the class claims from the perspective of all the relief sought in the complaint and released by the settlement. The contrary approach followed by the Alabama Supreme Court in this case -- looking solely to the relief provided by the settlement -- permits and encourages litigants to create mandatory, "non-opt-out" settlements that include injunctive relief for the sole purpose of depriving victims of their constitutional rights to pursue individual damages litigation. This Court should reaffirm *Shutts* and firmly reject the Alabama Supreme Court's contrary ruling.

II. Due Process Requires An Opt-Out Right With Respect to Any Substantial Damages Claims Included in a Class Action, Regardless of the Extent of Injunctive Relief Sought in the Complaint or Obtained in a Settlement.

Even assuming, *arguendo*, that this case is primarily "injunctive" in nature (which it plainly is not), the lower court's decision was still in error because it failed to permit class members to opt their damages claims out of the class. In our view, when a class action seeks to bind or release significant damages claims, due process requires that individuals be permitted to opt those claims out of the class suit, regardless of the extent of injunctive relief sought in the complaint or obtained in a class settlement. This conclusion follows logically from this Court's holding in *Shutts*: if there is a constitutional right to opt out of a class action "seeking to bind plaintiffs concerning claims wholly or predominately for money judgments," then reason dictates that the opt-out right endures even when such damages claims are coupled with claims for injunctive relief. Any other result would elevate form over substance -- that is, an individual's opt-out right in any given

case would depend solely on whether his or her damages claim happened to be accompanied by a request for injunctive relief. If this were the law, then the opt-out right recognized in *Shutts* would be rendered largely meaningless, since requests for significant injunctive relief could easily be added to virtually any class action for damages.

Moreover, there is no policy justification for permitting mandatory class certification in "hybrid" cases that contain a mixture of injunctive and damages claims. It is a fundamental tenet of American law that every individual is entitled to his or her day in court. *Martin v. Wilks*, 490 U.S. 755, 762 (1989). Class actions have been an exception to this principle -- but an exception of limited scope and application only when it is manifest that the due process rights of absent class members will be protected. *See generally Newberg* §§ 1.09-10. To ensure that absent class members' due process rights are protected, mandatory classes have historically been permitted only under very limited circumstances -- *i.e.*, in cases where class members' rights are indivisible and there is a common interest in unitary relief.

A classic example is where a group of stakeholders seek access to a common, limited fund. In such a case, because the stakeholders are all seeking a slice of a single pie, there is a strong practical need for a single outcome. This, of course, is the situation envisioned by Fed. R. Civ. P. 23(b)(1)(B), which permits mandatory class certification in cases where individual actions would "as a practical matter be dispositive of the interests of the other members not parties." A mandatory class is also warranted in a civil rights action seeking injunctive relief concerning, for example, a defendant's promotion practices. In such a case, the injunctive ruling must apply to everyone if there is to be a rule at all, and so there can be no opt-outs from the injunctive aspect of the case. This situation is embodied in Fed. R. Civ. P. 23(b)(2), which permits mandatory class

certification where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief . . . with respect to the class as a whole." In both of these examples, mandatory classes are permissible because there is an overwhelming practical need for common relief and class members' rights are truly indivisible. *See Newberg* § 1.22, at 1-51 (these two types of mandatory classes "are analogous to interpleader or quasi-in-rem suits in which *equitable circumstances dictate the need for a unitary adjudication regardless of the individual consent of the parties affected.*") (emphasis added).

This rationale for permitting mandatory classes -- that class members share an indivisible, unitary interest in common relief -- does not exist with respect to claims for damages. Unlike the common fund and injunctive relief cases described above, class actions involving *in personam* claims for damages aggregate individualized claims that present some common factual and legal questions *but are otherwise unrelated*. In such cases, not only is there no practical need for a single outcome, but the inherent heterogeneity of damages claims gives class members an especially strong interest in controlling their own litigation. While a stakeholder with an *in rem* claim against a common fund has a strong interest in remaining *in* the litigation (to ensure that she is served a piece of the pie), a tort victim with inherently individualized damages claims may have an equally strong stake in pursuing her own remedy. *See, e.g., Holmes v. Continental Can Co.*, 706 F.2d 1144, 1156 (11th Cir. 1983) ("[h]eterogeneity, and its attendant potential for diverging interests, necessitated special rules of procedure to protect absent class members of the (b)(3) class"). In recognition of the potential for diverging interests in damages classes, federal Rule 23(b)(3) requires -- and *Shutts* held -- that such classes are only permissible where class members are

given a right to exclude themselves from the litigation.

In this case, the Alabama Supreme Court held that this opt-out right may be abrogated in hybrid cases where damages claims are coupled with substantial injunctive relief. This approach cannot be right, for the simple reason that the mere inclusion of injunctive relief in a case that also seeks money damages does not create the sort of unified interest in a common result that justified the creation of mandatory classes in the first place. Although there may be a practical need for a single outcome with respect to the *injunctive relief* sufficient to justify certification of a mandatory class with respect to *those claims*, there is no reason to deprive class members of the right to exclude their *damages claims* from the case. Thus, the proper approach is to permit mandatory class certification with respect to any injunctive relief sought in a hybrid class action, but to certify the class on an opt-out basis with respect to the damages claims. *See, e.g.*, James W.M. Moore, 3B *Moore's Federal Practice*, ¶ 23.41[5] (Matthew Bender 1993) at 23-296 (where "injunctive relief and damages would be equally appropriate remedies, and both may be obtained, the court should divide the suit into subclasses handled under the separate subdivisions of [Rule 23](b); in many such situations class action treatment may only be necessary for the injunctive aspect, with those individuals suffering actual injury pressing their individual claims for damages in a separate count.") (footnotes omitted).[7]

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[7] Although the Alabama Supreme Court did not specifically address the propriety of the trial court's order certifying a mandatory class under Alabama Rule 23(b)(1)(A) and (B) (*see* n.5, *supra*), there is no unitary interest in common relief in this case that would justify certification of a mandatory class as to damages, regardless of which provision of Alabama Rule 23 is utilized. The trial court indicated that a non-opt-out class was permissible under Rule 23(b)(1)(A) on the ground that permitting individual lawsuits could "establish incompatible standards of conduct for the party opposing the class."

Here, again, any other approach would invite abuse of the class action device. If this Court were to hold that due process does not require an opt-out right in hybrid class actions where the injunctive claims "predominate," then all defendants would have to do to achieve mandatory class certification is to persuade plaintiffs' counsel to couple their damages claims with a request for substantial injunctive relief. Even if the original complaint did not include such a request, a proposed hybrid settlement could be accompanied by an amended complaint that added claims for injunctive relief. Then, the parties could request mandatory class certification under Fed. R. Civ. P. 23(b)(2) on the ground that the case is primarily injunctive in nature.

This is, for example, precisely what occurred in *Hayden v. Atochem North American Inc.*, Civil Action No. H-92-1054 (S.D. Tex.), which involves a non-opt-out settlement of personal injury and property damage claims of individuals who

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It is well established, however, that the risk of different juries coming to inconsistent results in similar cases *as to damages* does not provide any basis for mandatory class certification under the identical provision of Federal Rule 23. *See, e.g., In re Dennis Greenman Securities Litig.*, 829 F.2d 1539, 1545 (11th Cir. 1987); *In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300, 305 (6th Cir. 1984). The trial court also certified the class under Rule 23(b)(1)(B) on the theory that permitting individual lawsuits to go forward in the future could eventually exhaust all of Liberty's assets, leaving some victims uncompensated. As petitioners explained in their *cert.* petition, however, this finding was not made until after the fairness hearing regarding the proposed settlement, and the objectors were never given an opportunity to dispute whether there was a limited fund sufficient to justify mandatory class certification under Alabama Rule 23(b)(1)(B). *See* Petition at 25-26. Putting aside the question of whether Rule 23(b)(1)(B) may *ever* be used as a vehicle for settling *in personam* damages claims, the absence of any proper evidentiary showing of a limited fund renders the trial court's certification of a mandatory class on this ground inappropriate as a matter of law, *see In re Bendectin*, 749 F.2d at 306, and prohibits any finding that there is a sufficient unitary interest as to damages to justify denial of the class members' constitutional right to opt out.

lived or worked near an agrichemical plant in Bryan, Texas, that spewed arsenic throughout the surrounding community. As originally filed, the case was an opt-out class action under Fed. R. Civ. P. 23(b)(3) for property damages and medical monitoring, and did not include any claims for personal injuries. After several years of litigation, however, the defendants offered to settle the case on the condition that the class be converted into a *mandatory* class action including both property damage and personal injury claims. Mandatory class certification was important to the defendants because it would permit them to cap their liability for future personal injury cases that were likely to arise from the arsenic poisoning. (Several individual personal injury cases had already been filed and settled for millions of dollars.)

The plaintiffs agreed, and filed an amended complaint seeking certification of a mandatory class under Fed. R. Civ. P. 23(b)(2). This mandatory class included not only the property damage claims set forth in the original complaint, but also the past and *future* personal injury claims of some 26,000 individuals who had been exposed to arsenic exposure from the Bryan plant. To justify the conversion from an opt-out to a mandatory class, the parties crafted a proposed settlement that included both monetary recovery and various components of "injunctive" relief, including a promise by defendants to stop producing, using, or handling arsenic at the Bryan facility. Despite the vehement objections of numerous class members who sought to opt out of the case to pursue their own damages claims, the Magistrate-Judge presiding over the case certified the mandatory class and approved a settlement that resolves the current and future damages claims of every class member. If the settlement is permitted to stand, then victims of arsenic poisoning in Bryan, Texas, will be forever barred from

litigating their own personal injury cases.[8]

For all the reasons stated above, this sort of manipulation would become commonplace if this Court holds that due process does not require an opt-out right in hybrid class actions in which requests for injunctive relief "predominate." Any such ruling would be manifestly at odds with *Shutts* and would lack any justification on policy grounds, since hybrid cases do not involve "such equitable circumstances that require a unitary adjudication of related claims to promote strong societal interests and avoid substantial prejudice to class members." *Newberg* § 1.22, at 1-54. The *only* argument that could be offered for depriving class members of the right to opt their damages claims out of hybrid cases is that mandatory classes occasionally help grease the wheels of settlement. This argument is easily answered, however, since no one can assert a legitimate interest in promoting the "efficient" resolution of disputes through procedures that strip litigants of their substantive rights without due process of law.

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[8] The proposed settlement in *Hayden* has not yet received final approval from the District Court Judge presiding over the case. The case has been stayed pending a final decision in the non-opt-out asbestos future personal injury class action recently approved by the Fifth Circuit. *See In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996), *petition for reh'g pending*. For a more comprehensive description of *Hayden*, *see* Coffee, J., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Columbia Law Review 1343, 1411-1414 (October 1995) (concluding that, "[u]ltimately, the *Hayden* outcome reflects not only the triumph of defendants over plaintiffs, but also that of present claimants over unrepresented and still unknown future claimants.")

CONCLUSION

For these reasons, we urge this Court to reverse the decision of the Alabama Supreme Court affirming the trial court's approval of a mandatory class settlement.

Respectfully submitted,

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